

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED
FEB 19 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Fees for Ancillary or Supplementary
Use of Digital Television Spectrum
Pursuant to Section 336(e)(1)
of the Telecommunications Act of 1996

MM Docket No. 97-247

**OPPOSITION AND RESPONSE OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.**

The Association of Local Television Stations, Inc. ("ALTV") hereby opposes the Petition for Reconsideration submitted by The Office of Communications, Inc., of the United Church of Christ, the Benton Foundation, the Center for Media Education, the Civil Rights Forum and Media Access Project ("UCC *et al.*").¹ ALTV also herein expresses its support for the Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc.²

¹Petition for Reconsideration, MM Docket No. 97-247 (filed January 15, 1999, by The Office of Communications, Inc., of the United Church of Christ, the Benton Foundation, the Center for Media Education, the Civil Rights Forum and Media Access Project) [hereinafter cited as "UCC Petition"].

²Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., MM Docket No. 97-247 (filed January 15, 1999) [hereinafter cited as "NAB/MSTV Petition"].

No. of Copies rec'd
LSI A B C D E

049

I. OPPOSITION TO UCC PETITION

ALTV respectfully submits that UCC *et al.* offer no sound argument justifying reconsideration of the Commission's decision to refrain from imposing fees on revenues received from home shopping, infomercial or direct marketing programming.³ The Commission determined that fees were not to be exacted "from existing broadcasters for existing services," but on "ancillary or supplemental services which will be provided on the DTV bitstream."⁴ The Commission also stated that home shopping, infomercial or direct marketing were "commercial advertisements, excluded by statute from the scope of ancillary and supplementary services as they are video services received by viewers without a fee."⁵ UCC *et al.* assail the Commission's rationale as

³*Report and Order*, MM Docket No. 97-247, FCC 98-303 (released November 19, 1998) at ¶¶39-40.[hereinafter cited as *Report and Order*].

⁴*Report and Order* at ¶40.

⁵*Id.* The Commission cited ALTV's Reply Comments, which stated in relevant part:

Home shopping, infomercial, and other direct marketing programming ... are no more than common forms of commercial advertising. Whereas they involve more ingenious methods of calculating the amount of consideration for the advertising, they no less than traditional spot advertising or program sponsorship involve the exchange of monetary consideration for time on a station to promote a product or service (*i.e.*, advertising time). Furthermore, they were well-known forms of advertising arrangements when Congress enacted the statute. No reason exists even to begin to suspect that Congress, nonetheless, sought to bring such forms of commercial advertising within the scope of the fees applicable to ancillary and supplementary services. Second, their revenues support broadcasting (and, indeed, the programs themselves are part of broadcasting) provided to the public as free, over-the-air television. No fee is charged viewers to such programs. Therefore, they readily fall outside the scope of feeable services as defined by the statute.

Reply Comments of The Association of Local Television Stations, Inc., MM Docket No. 97-247 (filed August 3, 1998) at 8 [footnotes omitted].

arbitrary and capricious, alleging, first, that the Commission has no authority to exempt “existing” services, and, second, that the Commission inconsistently has considered home shopping, infomercial or direct marketing services both “programming” and “commercial advertisements.”⁶ In the latter regard, UCC *et al.* argue that home shopping, infomercial or direct marketing programming is “programming,” which, unlike commercial advertisements, is subject to the fees adopted by the Commission in this proceeding. Neither of these arguments has merit.

First, the purported distinction between “programming” and “commercial advertisements” is false. At best, it epitomizes the proverbial distinction without a difference. That the Commission referred to home shopping, infomercial or direct marketing as both “commercial advertisements” and “services” (or in UCC’s parlance “programming”) reflects only the obvious, that a program may constitute a commercial advertisement. This is nothing new. As UCC *et al.* themselves point out, the Commission long ago embraced the concept of a program length commercial, defining it as a program “devoted to promoting the sponsor’s products or services.”⁷ Such a program is in every sense of the word an advertisement.⁸ In terms of Commission lore, such programs are considered “commercial matter.”⁹ “Commercial matter” is a term which subsumes two forms of broadcast advertising, “commercial continuity” and “commercial announcements.” According to the Commission:

⁶UCC Petition at 3.

⁷UCC Petition at 10, *citing Policy Statement on Program Length Commercials*, 44 FCC 2d 985, 987 (1974) [hereinafter cited as *PLC Policy Statement*].

⁸The term advertisement is defined in essence as “a public notice.” *See Webster’s Third New International Dictionary* (Springfield, MA, 1986) at 31; *Webster’s New Collegiate Dictionary* (Springfield, MA, 1959) at 14.

⁹*PLC Policy Statement, supra.*

The Commission's rules require logging of commercial matter. They define commercial continuity as the *advertising message of a program sponsor*, and state that "A commercial announcement is any other advertising message for which a charge is made, or other consideration is received." Such messages are required to be logged as commercials....¹⁰

Thus, a program length commercial, as commercial matter, in the particular form of commercial continuity (*i.e.*, the advertising message of a program sponsor), is by definition an "advertising message" or "advertisement."¹¹ Moreover, in the cases of home shopping, infomercial or direct marketing programs, they are advertisements "used to support broadcasting for which a subscription fee is not required."¹² Therefore, the exemption applies.

UCC's attempt to limit the term commercial advertisement to so-called commercial spot announcements is likewise unavailing.¹³ A commercial spot announcement is a form of commercial advertising. It, thus, is an advertisement, but it hardly is the *only* form of commercial advertisement. Again, nothing in the statute or any Commission pronouncement limits the concept of a commercial advertisement to a commercial spot announcement.

Second, UCC's analysis is deficient because it reads the statute incorrectly. Properly read, Section 336(e)(1) does not *define* what constitutes "ancillary and supplementary services." Section 336(e)(1) directs that fees be assessed with respect to those "ancillary and supplementary services"

¹⁰*Logging of Tradeout Credits*, 17 FCC 2d 972(1969); *Television Program Logging Rules*, 5 FCC 2d 185, 186 (1966) ("For commercial matter it is permissible to show the total duration of such matter in each hourly segment. No distinction need be made between commercial continuity and commercial announcements.").

¹¹Home shopping, infomercials, and direct marketing easily fall within the definition of a program length commercial. *See Program Length Commercials, supra*, 44 FCC 2d at 996-998; *Program -Length Commercials*, 69 FCC 2d 682, 685 (1978) ("[T]he Commission knows nothing more commercial than the conduct of a sale.").

¹²47 U.S.C. §336(e)(1)(B).

¹³UCC Petition at 10.

which satisfy the criteria in paragraphs (A) and (B) of subsection (e)(1). In other words, paragraphs (A) and (B) of subsection (e)(1) are not definitional, they are limitational. They limit and qualify the types of ancillary and supplementary services which are to be subject to fees, but they beg the question of what constitutes an ancillary or supplementary service.

The operative definition of ancillary and supplementary services can be found in the Commission's rules. Section 73.624(c) permits DTV stations to provide telecommunications services on an "ancillary or supplementary basis." After describing various services which might be offered on an "ancillary or supplementary basis," Section 73.624(c) provides that "no video broadcast signal provided at no direct charge to viewers shall be considered ancillary or supplementary." Therefore, a home shopping channel offered as a free, broadcast service would fall outside the definition of ancillary and supplementary and, thus, would be exempt from the fee required by Section 336(e) of the Act. This would be no less true in the case of infomercials or direct marketing programs.

In view of the above, the Commission might be faulted for hesitating to belabor the obvious concerning what constitutes an advertisement or even an ancillary or supplementary service, but it hardly has acted in an arbitrary or capricious manner. Home shopping, infomercials, and direct marketing are not "ancillary or supplementary" services when offered as free, broadcast programming. Furthermore, they are advertisements -- and advertisements which support broadcasting. Therefore, under Section 336(e)(1), they are not subject to fees applicable to the specified "ancillary or supplementary" DTV services.

II. RESPONSE TO NAB/MSTV PETITION

ALTV fully supports the NAB/MSTV position that the Commission's selection of five percent as the appropriate level of fee is arbitrary and capricious. Like NAB, ALTV provided the Commission with evidence supporting a much lower fee. That evidence also was discounted improperly. To the extent the Commission may believe it has explained its reticence to consider ALTV's evidence because it was based in part on auction value of non-broadcast spectrum, ALTV joins with NAB and MSTV in pointing out that the sorts of ancillary or supplementary services to which the fees apply are *non*-broadcast services.¹⁴

ALTV also faults the Commission's analysis in that regard as incomplete. It focuses only on the demand side of the equation, looking only to the uses for which bidders might make of spectrum.¹⁵ Left out is the supply side. The record shows an ever increasing supply of auctionable spectrum.¹⁶ Plentiful goods are cheap. The current gasoline market is illustrative. Supply is plentiful, prices are down.¹⁷ The Commission might suggest analogously that the price of gasoline

¹⁴*See, e.g.*, Section 73.624(c) of the Commission's Rules and Regulations, 47 CFR §73.624(c) ("The kinds of services which may be provided include, but are not limited to computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, subscription video....").

¹⁵*Report and Order* at ¶28.

¹⁶Comments of the Association of Local Television Stations, Inc., MM Docket No. 97-247 (filed May 4, 1998) at 9-11.

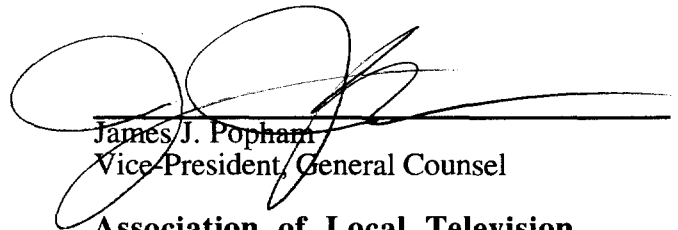
¹⁷The same is happening to spectrum, as observed by John Haring in his analysis of the issue for ALTV:

Scarcity values reflect the interaction of economic forces of supply and demand. Generally speaking, as the FCC has rationalized its management of the spectrum and substantially increased the supply of spectrum resource rights, the

is no indication of the price of heating oil because demand for each is independent of the other. However, if oil is plentiful, the prices of both gasoline and heating oil will be lower than if oil were scarce. Similarly, the Commission hardly may ignore that, regardless of intended use or demand, the increasing supply of spectrum is irrelevant to the value of spectrum in an auction context.

ALTV, therefore, urges the Commission to deny the UCC Petition and to reconsider and lower the five per cent percentage level of the fee imposed on ancillary and supplementary DTV services.

Respectfully submitted,



James J. Popham
Vice President, General Counsel

**Association of Local Television
Stations, Inc.**
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

February 19, 1999

spectrum and substantially increased the supply of spectrum resource rights, the scarcity value of the spectrum has progressively fallen. This is illustrated by the secular decline in the auction values of various spectrum resource rights used for mobile communications services, which fell from over \$3 per MHz per pop in 1994 to some 30 cents per MHz per pop in 1997. Indeed, if one were extrapolating based on the trend in auction values, one would predict that scarcity values will soon become virtually nil.

Haring, John, *Fees for Ancillary and Supplementary Use of Digital Television Spectrum*, Strategic Policy Research (April 28, 1998), at 14-15, a copy of which is attached to ALTV's comments in this proceeding.

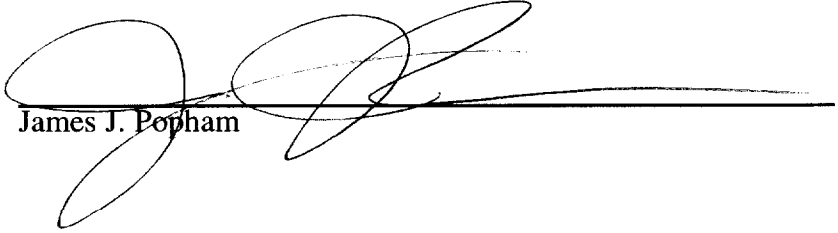
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Opposition and Response of The Association of Local Television Stations, Inc.," were served on this 19th day of February, 1999, via first class mail, postage prepaid, upon the following:

Gigi B. Sonn
Media Access Project
1707 L Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for UCC *et al.*

Jack N. Goodman
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Jonathan D. Blake
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20007
Counsel for MSTV



James J. Popham